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CLIMATE CHANGE AND PROTECTION OF HUMAN RIGHTS. WHAT ROLE DO THE SUPRANATIONAL COURTS PLAY?

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Abstract: The present paper analyzes the jurisprudence coming from the European Court of Human Rights in a comparative way with the Court of Justice of the European Union in the field of climate change. The role of the two courts is certainly very important to be called upon in a more in-depth investigation. What limits, what problems, what positions have the judges held regarding the issues of protection of human rights, environmental life and health as well as the important right of access to the protection of these rights that the judges of Luxembourg have carried out are the main subjects of analysis of the present work.

Keywords: European Court of Human Rights; Court of Justice of the European Union; climate change; human rights; supranational courts.

INTRODUCTION

Speaking for environmental and human rights protection and especially after the extreme heat and cold of last years is a reality of global nature (Atapattu, 2008; Humphreys, 2009; Limon, 2009; Knox, 2009-2010; Bodansky, 2010; Kravchenko, 2010; Roht-Arriaza, 2010; Pedersen, 2010; McInerney-Lankford, Darrow & Rajamani, 2011; Humphreys, 2012; McInerney-Lankford, 2013; Stillings, 2014; Atapattu, 2016; Quirico, 2017; Bodansky, Brunnée, Rajamani, 2017; Albers, 2018; Duyck, Jodoin, Johl, 2018; Lewis, 2018; Peel, Osofsky, 2018; Schapper, 2018; Knox, 2019; Kahl, 2022)¹. Threats against human rights, widespread and

¹According to Atapattu: “(...) states are required to give effect to their international obligations whether they are environmental, human rights, or economic in nature and these obligations will be applicable when

severe climate impacts as a contemporary reality is a debatable topic connectable with climate impacts (Liakopoulos, 2011; Atapattu, Schapper, 2019)².

The international courts have been oriented in recent years in this sector, i.e. to the climate litigation sector, arriving to speak not only of national but also of supranational courts linking human rights with global warming (Peel, Orofsky, 2018). The present work will be focused comparatively on an analysis of jurisprudence in human rights protection and climate change between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Limits and advances in the litigation sector are some of the topics analyzed in the respective conventional regimes.

fulfilling their obligations under climate agreements (...)"

²See, IPPCC, Sixth assessment report 2021–Climate Change 2021 of 9 August 2021: <https://www.ipcc.ch/assessment-report/ar6/> "(...) every tenth of a degree of additional warming will increase the threats to people, species and ecosystems and, if warming exceeds, even temporarily, the temperate climate by 1.5 degrees Celsius, other much more serious and often irreversible effects of climate change will occur (...)".

RECOGNITION OR NOT OF AN ENVIRONMENTAL RIGHT IN THE EUROPEAN CONTEXT?

Environmental policy is a topic that enters the EU policies with a progressive, precise and decisive development that started from the European Council of 1972 with the approximation of national legislation on the integration of powers of the European institutions in case of necessary actions in the realization of the purposes of the Union³.

The Single European Act was oriented towards safeguarding, protecting and improving the environment by contributing to the protection of human health and natural resources (Preston, 2018; Blanke, Mangiamelli, 2021)⁴ and arriving at the Maastricht Treaty with the task:

“(…) to promote “sustainable and non-inflationary growth” as well as a high level of environmental protection and improvement of the quality of the latter (…)” (Blanke, Mangiamelli, 2021)⁵.

³CJEU, C-240/83, Waste oils of 7 February 1985, ECLI:EU:C:1985:59, 00531. C-302/86, Container for beer and soft drink of 20 September 1988, ECLI:EU:C:1988:481, 04607.

⁴According to Single European Act, Title VII. Environment, Art. 130 R par. 1.

⁵See Art. 2 par. 4 of the TEC (Maastricht consolidated version).

In the integrative stage of Amsterdam, environmental protection has become a general principle of EU law as transversal protection, introducing the obligation of sectoral policies of the Union and promoting sustainable development (Vanderheiden, 2018)⁶ as a principle of the European integration. With the Treaty of Lisbon the environment was confirmed as a necessity and economic development should respect environmental resources. The objective of sustainable development which is regulated through art. 2 TEU is based:

“(...) on a high level of protection and improvement of the quality of the environment (...) extended beyond the mere economic dimension and projected in a global perspective (...)”⁷.

⁶“(...) the emphasis on and the power of narrative in the documents produced by young litigants evoke the narratives of past atrocities and human rights violations that (...) are increasingly told by victims in various international arenas and forums (...) a key difference. The child litigants in climate lawsuits reference present losses and deprivations but also focus on the hardship and atrocities to come. Hence, these narratives do not serve functions of redress, healing or closure. They are intended to warn and to prevent, to compel governments to take effective action (...)”.

⁷See Art. 3.5 TEU, which refers the expression of the “sustainable development of the Earth”, and according to Art. 21.2 lett. F TEU: “(...)”

The environmental policy of the Union is oriented towards a fight against climate change according to art. 191.1. TFEU (Blanke, Mangiamelli, 2021). The environmental protection of the Union has also been included in the Charter of the Fundamental Rights of the European Union (CFREU) by providing through art. 37 that:

“(...) a high level of environmental protection and the improvement of its quality must be integrated into the policies of the Union and guaranteed in accordance with the principle of sustainable development”.

As is evident, art. 37 does not proclaim an individual right but contemplates the protection of the environment as a mere political objective (Kiss, 2004).

It is a statement with programmatic value. The explanations of the CFREU are based on Art. 3.3. TEU (Blanke, Mangiamelli, 2021)⁸, as well as on Articles 11 and 191 TFEU as an added value of the environment which implies a “human rights significance in the EU legal context” (Bogojevic, 2017). The absence of a precise

international measures aimed at preserving and improving the quality of the environment and the sustainable management of the world's natural resources, with a view to ensuring sustainable development (...).”

⁸See art. 3.3 TEU.

recognition of the individual right of the environment is oriented towards art. 37 as a main law in the matter (Bailleux, 2018). The CFREU limits the justiciability of the provisions that contain principles, i.e. rights with the objective of interpreting the control of legitimacy on legislative and executive acts for the implementation of the related institutions, bodies, offices and agencies of the Union and/or the authorities of the Member States which are implemented in the exercise of their respective competences (Kellerbauer, Klamert, Tomkin, 2019)⁹ and as principles recognized by the CFREU according to art. 37 (De Sadeleer, 2012; Kellerbauer, Klamert, Tomkin, 2019; Peers, Hervey, Kenner, 2021)¹⁰.

Art. 37 describes the healthy environment not as an individual right but as having potential value as we can see

⁹See Art. 52. 5 CFREU.

¹⁰“(…) inasmuch as it was fleshed out into more concrete measures adopted either by the EU institutions either by the national authorities (…)”.

on the jurisprudence of the CJEU¹¹ and the Strasbourg Court¹². Equally important is Art. 4(2) lett. e) TFEU (Blanke, Mangiamelli, 2021) which includes the environment among the related matters over which the Union has competence of a nature concurrent with that of the Member States. Climate change thus specifically involves issues that cannot be adequately addressed by Member States at the national level (Gonzalez, 2013). The latter have entrusted the Union with an important role in the fight against pollution and climate change. In addition to being part of the UNFCCC, as

¹¹European Parliamentary Research Service, A universal right to a healthy environment, December 2021:

[https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA\(2021\)698846_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf) affirms that: “(...) 19 out of 27 EU countries have enshrined this right in their constitutions (some only implicitly) and 17 in their national law. Austria, Denmark, Germany, Luxembourg, Malta, Netherlands, Poland, Sweden have done neither, but are parties to the Aarhus Convention (...)”.

¹²See Art. 52.3 CFREU which affirms that: “(...) where this Charter contains rights corresponding to those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of the same are the same as those conferred by the aforementioned convention. This provision does not preclude Union law from granting more extensive protection (...)”.

well as of other international climate protection instruments, the European Union is also part of the Kyoto Protocol and the Paris Agreement by adopting directives, regulations and decisions, i.e. binding acts by setting the emissions target zero by 2050. The EU and the Member States coordinate their climate policies by establishing greenhouse gas emission reductions based on the European regulatory framework in the light of international obligations.

The differential element is not identified in the mixed nature of those countries such as Great Britain and Poland which were against the inclusion of social rights in the CFREU¹³. Such type of limit introduces an obligation on the European institutions and the Member States¹⁴ to assume the role of environmental integration and follow the needs

¹³Art. 1.2 of the Protocol (n. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, annexed to the TEU and to the Treaty on the Functioning of the European Union.

¹⁴Art. 51, par. 1 CFREU: “(...) applies first of all to the institutions and bodies of the Union in compliance with the principle of subsidiarity (see the explanation of Article 51), but also to Member States, albeit the implementation of Union law (...)”.

of the policies of the Union (Etty, Heyvaert, Carlarne, Huber, Peel, Van Zeven, 2020)¹⁵. Art. 37 CFREU (Kellerbauer, Klamert, Tomkin, 2019) thus represents an extensive object of environmental law (Jans, Vedder, 2012)¹⁶ and at the same time the basis that takes into consideration the competences of the Union given the affirmation of the integrative principle and compliance with other European policies (Marìn Duràn, Morgera, 2013)¹⁷. The principle of environmental integration thus appears as a general principle of the Union¹⁸ which finds a position in the system of European sources, as a principle which allows the relative discretion of the European institutions by translating derivative acts with environmental needs and

¹⁵See, Art. 11TFEU. GC, T-141/19, Peter Sabo and Others v. European Parliament and Council of the European Union of 6 May 2020, ECLI:EU:C:2020:179, not yet published.

¹⁶“(…) there is European legislation in almost every conceivable field of environmental policy (…)”.

¹⁷“(…) the scope of application of article 37 is wide-ranging, if not almost all-encompassing, both at EU and Member State level (…)”. See also the case: C-229/87, Commission of the European Communities v. Hellenic Republic of 15 November 1988, ECLI:EU:C:1988:501, par. 20.

¹⁸Art. 11 TFUE.

influencing sustainable development:

“(...) to be weighed up against social and economic interests (...)” (De Sadeleer, 2012; Langlet, Mahmoudi, 2016; Scotford, 2018)¹⁹.

THE ROLE OF PRIVATE INDIVIDUALS IN ENVIRONMENTAL MATTERS

Article 263, par. 4 TFEU (Blanke, Mangiamelli, 2021) introduced the legal standing of natural and legal persons, i.e. non-privileged applicants who could challenge all the

¹⁹According to De Sadeller: “(...) there are a number of problems with defining sustainable development in more concrete terms and translating the principle into practical measures. This is particularly the case when, for example, social and ecological interests (actually or apparently) conflict (...)”. See the Advocate General Philippe Lèger in case: C-277/02 EU-Wood-Trading of 23 September 2004, ECLI:EU:C:2004:547, I-11957, “(...) whilst article 37 adds nothing new and legally radical to Articles 3(3) TEU and 191 and 11 TFEU, it nonetheless adds weight to these fundamental EU legal provisions, which have nascent but evolving roles in developing environmental protection obligations in EU law. This reading serves to accommodate two seemingly opposing approaches to the Charter: that there should be no extension of EU legal or judicial competence in interpreting the Charter, and that the Charter can also be a source of authority for the “discovery” of new principles of EU law (...)”.

acts that are adopted against the applicant directly and individually as well as the regulatory acts which concern directly and do not involve implementing measures.

In the Plaumann jurisprudence it has already affirmed that:

“(...) he is not the addressee of a decision which concerns him individually only if the provision affects him due to certain personal qualities, or particular circumstances capable of distinguishing him from the general public, and identify it in the same way as the recipients (...)” (Craig, de Búrca, 2011; Craig, 2012)²⁰.

A position that was also highlighted by the Advocate General Jacobs in the *Unión de Pequeños Agricultores*

²⁰CJEU, C-25/62, *Plaumann v. Commission* of 15 July 1963, ECLI:EU:C:1963:17, 00199, par. 50: “(...) it is true that every individual is likely to be affected one way or another by climate change, that issue being recognized by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application (...) a different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating locus standi for all without the criterion of individual concern within the meaning of the case-law resulting from the judgment of (*Plaumann*) being fulfilled (...)”.

(UPA) case (Barav, 1974; Rasmussen, 1980; Arnall, 1995; Albros-Llorens, 2003) stating that:

“(...) in reasonable circumstances specific to him, [the] act (de quo) harms or could substantially harm his interests (...)”²¹.

In reality it is a proposal that the individual interest is considered to be satisfied through the general scope that concerns the applicant, i.e. both the natural or legal person who “(...) affects, in a certain and current manner, his sphere (...)” as we noted in the Quere case²². Already since 2005 the CJEU during the approval of the Union in relation to the Aarhus Convention affirmed the:

“(...) access to information, public participation in the decision-making process and access to justice in environmental matters (...) generally to the recognition of environmental protection and the right to an effective remedy in Articles 37 and 47 of the Charter of Fundamental Rights of the European Union (...)”.

²¹CJEU, see the conclusions of the Advocate General in case: C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union* of 21 March 2002, ECLI:EU:C:2002:197, par. 73.

²²Court of First Instance, General Court in case: T-177/01, *Jègo-Quèrè and Cie SA v. Commission of the European Communities* of 3 May 2002, ECLI:EU:C:2002:112, II-02365 par. 51.

The Aarhus Convention accords a privileged status to NGOs, active in environmental protection and recognizing among other things, an automatic locus standi for the purposes of art. 9.3 (relating to access to judicial and administrative protection) to those NGOs that meet the requirements established by national law (in the case of the Union, by the so-called Aarhus regulation)²³. The CJEU followed even after the entry of the convention into force the Plaumann jurisprudence and legitimized environmental protection associations as active for groups of people since the contested act does not directly and individually concern this type of organisations, thus:

“(...) the right of direct access to climate justice, in the

²³Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13-19 modified with a new Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies PE/63/2021/REV/1, OJ L 356, 8.10.2021, p. 1-7.

European legal system, has so far found only partial recognition, substantially limited to the right of private individuals to participate in administrative procedures that concern them (...)"²⁴.

Even if this path is not followed in environmental matters, they can be challenged indirectly through the national judge and the recourse to the preliminary reference based on Art. 267 TFEU and through the objection of invalidity according to Art. 277 TFEU (Blanke, Mangiamelli, 2021) and/or through the internal administrative appeal²⁵.

²⁴GC, T-177/01, *Jègo-Quèrè and Cie SA v. Commission of the European Communities* of 3 May 2002, ECLI:EU:C:2002:112, II-02365 par. 78.

²⁵ACCC, Findings and recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (part I) concerning compliance by the European Union, 24 August 2011 and Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, 17 March 2017), art. 10: "(...) any non-governmental organization or other member of the public which satisfies the criteria set out in article 11 shall have the right to submit a request for internal review to the Union institution or body which adopted the administrative act or, in the event of an alleged administrative omission, that he should have done so, if he considers that the act or omission constitutes a violation of environmental law within the meaning of Article 2(1)(f) (...)".

This type of protection formulated in Art. 263, para. 4 TFEU²⁶ as well as the restrictive nature of the Plaumann clause renders the jurisdictional system offered by the Union legal system to private individuals incomplete. This evidence was denied by the CJEU which moved towards a vision of an overall nature (Hadjiyianni, 2021) which concerned direct and indirect protection considering as:

“(...) all suitable to satisfy the right to obtain effective judicial protection”. However, “from the perspective of the appellants, in reality it is not a question of means that can be considered equivalent (...)”²⁷.

Through the principle of effective judicial protection, the CJEU has finished attributing the responsibility for the gaps in protection to the national legal systems. Within this context, the Carvalho case is recalled, expressing an adequacy of climate regulations to the rights of individuals. In the case just mentioned:

“(...) the 37 applicants had turned to the European judge to denounce the insufficiency of the mitigation measures

²⁶CJEU, C-352/19 P, Région de Bruxelles-Capitale of 3 December 2020, ECLI:EU:C:2020:978, not yet published, par. 30ss.

²⁷CJEU, C-352/19 P, Région de Bruxelles-Capitale of 3 December 2020, op. cit.

decided by the EU in compliance with the obligations to reduce greenhouse gas emissions deriving from the 2015 Paris Agreement (...)."

The annulment of three acts of secondary law (Directive (EU) 2018/410 and Regulations 2018/841 and 2018/842), are adopted by the European institutions in 2018 to give effect to the Union's climate policy for 2030 (Winter, 2020).

The appeal is declared inadmissible due to lack of standing of the relevant appellants according to the Plaumann formula. The appellants were neither direct nor individual interested in the contested acts and:

"(...) the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application (...)"²⁸.

²⁸CJEU, T-330/18, Armando Carvalho and others v. European Parliament and Council of the European Union of 25 March 2021, ECLI:EU:C:2021:252, par. 50: "(...) while all persons may in principle enjoy the same right (such as the right to life, or the right to an occupation) the effects of climate change (to which the EU Emissions Acts under challenge contribute) and hence the infringement of rights is distinctive and different for each individual. A farmer who is affected by drought is in a different position from a fisherman affected by a loss of sea ice. Even within the group of

The Luxembourg judges refused to modify the Plaumann formula, affirming the inviolability of a test which avoids incurring a violation of the Treaty of Union²⁹. The error that considers the regulatory provision of interpretation inseparable consolidates what has been codified by the CJEU itself placing the judges of Luxembourg in a leading role for the near future in the face of a modification of primary law thus widening the locus standi of private individuals (Pagano, 2019)³⁰. Faced with the climate change phenomenon of widespread and irreversible serious effects, the CJEU through the Advocate General Jacobs states that the:

“(...) high is the number of people affected by an act, the

farmers affected by drought, each suffers the consequences differently. As set out below, each applicant is affected by climate change (and the breach of legal obligations) idiosyncratically and is therefore distinguished from all other persons (...)”.

²⁹CJEU, C-565/19 P, *Carvalho and others v. Parliament and Council* of 25 March 2021, ECLI:EU:C:2021:252, par. 76-78. C-297/20 P, *Peter Sabo and others v. European Parliament and Council of the European Union* of 14 January 2021, ECLI:EU:C:2021:24, not yet published, par. 29.

³⁰“(...) mobilise EU citizens by inspiring them with “climate stories”. This in order to obtain something probably much bigger than winning a case or get access to justice: winning the favour of citizens (...)”.

lower is the possibility of an effective judicial review (...)"³¹.

In the same spirit is the P v. Ministre de la Transition écologique case where the CJEU has confirmed and recognized the existence of a subjective right to the environment based on secondary legislation where atmospheric pollution places restrictive obligations on Member States³². The EU has established some contestation limits for air pollution in the territory of the Member States through the Directives 2008/50³³, 96/62³⁴, 1999/30³⁵,

³¹CJEU, see the Advocate General Jacobs in case: C-50/00 P, Unión de Pequeños Agricultores v. Council of the European Union presented in 21 March 2002, ECLI:EU:C:2002:197, I-06677, par. 102.

³²CJEU, C-61/21, Ministre de la Transition écologique y Premier ministre of 22 December 2022, ECLI:EU:C:2022:1015, not yet published.

³³Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1-44.

³⁴Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ L 296, 21.11.1996, p. 55-63.

³⁵Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999, p. 41-60.

80/779³⁶ and 85/203³⁷.

The Directives have required Member States to ensure the relevant levels of the PM10 and NO2 not to exceed the respective territory, respecting thus the appropriate measures to remedy the plans for air quality. Already in Art. 23 of the Directive 2008/50 that is used in case C-404/13 imposed the obligation to establish an air quality plan that satisfies some requirements. This obligation is invoked by individuals against public authorities (Ashkem, 2017; Humby, 2018)³⁸. According to the case:

“(...) Hexagone had not taken steps to ensure that the levels of NO2 and PM10 in the air did not exceed the limit values indicated by European legislation”.

For the deterioration in his state of health caused by the deterioration of the air quality in Paris, his city of

³⁶Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980, p. 30-48.

³⁷Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.3.1985, p. 1-7.

³⁸CJEU, C-404/13, ClientEarth and Regina v. The Secretary of State for the Environment, Food and Rural Affairs of 19 November 2014, ECLI:EU:C:2014:2382, published in the Electronic Reports of the cases.

residence, the applicant claimed compensation of 21 million euros. The CJEU confirmed in this case the Francovich jurisprudence³⁹, which conditions the liability of the state for damages caused to individuals by violations of EU law attributable to it to the existence of three conditions (that the violated law is preordained to confer rights on individuals, that the violation of this rule is sufficiently qualified, and that there is a direct causal link between this violation and the damage suffered by said subjects), limited itself to examining the first condition⁴⁰. The CJEU has therefore not followed the path suggested by the Advocate General Kokott, who starting from the binomial between environmental and health protection had stated that the limit values set by the EU and the obligations of the Member States to improve the quality of air would be preordained to protect human health and to confer rights on individuals. The circle of recipients would

³⁹CJEU, C-479/93, *Francovich and others v. Italy* of 9 November 1995, ECLI:EU:C:1995:372, I-03843. C-278/20, *Commission v. Spain* of 28 June 2022, ECLI:EU:C:2022:503, not yet published.

⁴⁰CJEU, C-61/21, *JP v. Ministre de la Transition écologique* of 22 December 2022, *op. cit.*

in any case be limited to well-defined and identifiable categories who have stayed in specific highly polluted places (Pagano, 2023)⁴¹ and who should prove the required etiological link on the basis of periodic medical reports⁴².

Through this ruling, the CJEU made us understand the need to avoid appeals at the time of refusal to play a substitute role for the European legislator. Certainly the will exists in the choice of the type of deed which in its content attributes rights to individuals in the field of the environment.

Also the Regulation n. 2021/1119 clearly excluded the attribution to private rights⁴³. The revision of the directive

⁴¹CJEU, see the conclusions of the Advocate General Kokott in case: C-61/21, JP v. Ministre de la Transition écologique of 5 May 2022, ECLI:EU:C:2022:359, which is affirmed that: “(...) reminded us that the demands for environmental and social justice are strictly intertwined and that the burden of proof would still act as a filter for abusive claimants seeking unjustified compensation (...)”.

⁴²CJEU, C-61/21, JP v. Ministre de la Transition écologique of 5 May 2022, op. cit., parr. 63-64.

⁴³Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending regulation (EC) n. 401/2009 and regulation (EU) 2018/1999 (European legislation on the climate), see in particular art. 5.

on ambient air quality was presented by the European Commission on 26 October 2022. This proposal unequivocally recognizes the health damaged by air pollution and the right to be compensated in case of violation of the rules of the Union and in matters of air quality as well as being represented by a non-governmental organization in class actions for compensation for damages.

CLIMATE LITIGATION OF THE ECtHR

The *Duarte Agostinho and others v. Portugal* case of 7 September 2020 accused 33 States that have not taken sufficient measures to combat climate change by violating articles 2, 8 and 14 of the ECHR (Villiger, 2023). However, the appeal was declared inadmissible by the ECtHR. The second appeal on the subject of climate change from the *Verein Klimaseniorinnen Schweiz and others v. Switzerland* CASE is however the first admissible case on climate change before the ECtHR (Schmid, 2022; Matheson, Carlson, Rink, 2023)⁴⁴.

⁴⁴ECtHR, *Duarte Agostinho and Others v. Portugal and others* of 13 November 2020. *Verein KlimaSeniorinnen Schweiz and others v.*

The jurisprudence of the ECtHR did not recognize an autonomous right to environmental health as well as a right to health. However, through the ECHR (European Convention on Human Rights), the ECtHR recognized the existence of various procedural rights in environmental matters accompanied by the need for a healthy environment as a substantive right. Some rights codified in the conventional text (such as first of all the right to private and family life, the right to life, the right to a fair trial).

“(...) The national courts do not become Convention courts (§99) (...). It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance

Switzerland of 17 March 2021: “(...) if the question which is the subject of the appeal before a Chamber raises serious problems of interpretation of the Convention or its protocols, or if its solution risks leading to a contradiction with a previous judgment of the Court, the Chamber, until has not delivered its judgment, it may divest itself of its jurisdiction in favor of the Grand Chamber unless one of the parties objects to it (...)”.

with the current Strasbourg jurisprudence (§ 104) (...)”⁴⁵.

The ECtHR did not react outside its competences also in this case of environmental matters (Shelton, 2015; Feria-Tinta, Milnes, 2016; Papantoniou, 2018; Campbell-Durufèle, Atapattu, 2018; Abello-Galvis, Arevalo-Ramirez, 2019; Pedersen, 2019; Tigre, Urzola, Sebastián Castellanos, 2023)⁴⁶, stating that:

“(...) UN treaty bodies and the Inter-American and European tribunals most often hear complaints about failures to enforce national environmental rights or about environmental degradation that violates one or more of the guaranteed rights in the agreements over which they have jurisdiction”.

In other words, human rights tribunals hear human rights cases-they do not hear environmental cases as a living instrument, far from being the result of an ultra-

⁴⁵“(...) the living instrument’ doctrine does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times (...)”.

⁴⁶Inter American Court of Human Rights Advisory opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia, par. 70: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf

progressive approach of the Strasbourg judges. It also finds foundation and *raison d'être* in rules relating to the systemic interpretation of treaties, codified in Art. 31.3 lett. c) of the Vienna Convention on the law of treaties, according to which the interpreter must take into account

“every relevant rule of international law, applicable to the relations between the parties (...)” (Tigre, Urzola, Sebastià Castellanos, 2023).

As we can understand the source for the protection of the environment was, in turn, Art. 8 ECHR which recognizes the right to respect private and family life.

From the past, among the landmark cases we recall the *Lopez-Ostra v. Spain* for violation of Art. 8 ECHR (Marjanac, Patton, 2018) relating to the emissions of a plant for the treatment of waste produced by numerous tanning companies which are built with state subsidies and located a few meters away from the Lopez-Ostra family home. For the first time the ECtHR recognized the link between environmental damage and the infringement of a right recognized by the ECHR according to art. 8 stating that:

“(...) severe environmental pollution may affect individuals' well-being and prevent them from enjoying

their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (...)” (Villiger, 2023)⁴⁷.

The Spanish authorities convicted because they did not fulfill the positive obligations deriving from art. 8 as well as from their failure to have struck a fair balance between the economic interest of the area and the rights of the appellants where, according to the margin of discretion, the Court recognized this provision to the states.

Continuing with the *Guerra v. Italy* (Villiger, 2023) case⁴⁸, related to the Enichem chemical plant near the town of Manfredonia in Italy, the ECtHR stated that the state had to intervene before to the environmental zone because it became so degenerate endangering the existential life of citizens. The related Art. 8 ECHR implied the right to be informed about the risks that could derive from a conduct that continued to endanger an accident inside the aforementioned chemical factory.

In the *Hatton v. Great Britain* case of 8 July 2003 a reduction of the openings in environmental matters is noted due to

⁴⁷ECtHR, *Lopez Ostra v. Spain* of 9 December 1994, par. 51.

⁴⁸ECtHR, *Guerra and others v. Italy* of 19 February 1998.

the complaints of the applicants who resided in the vicinity of Heathrow airport for an increase in pollution due to night flights authorized by regulatory provisions which were introduced in 1993. The ECtHR emphasizing the subsidiary function of the Convention established the national authorities in their own direct legitimacy based on a principle (than to the international court) to better evaluate local needs and conditions⁴⁹. The British authorities in this case had correctly balanced the competing interests within the limits of the wide margin of appreciation recognized to them. However, the exercise of such a discretionary power by the states parties had to be considered subject to its control, which may concern, first of all, the merits of the decision taken by the state authorities in environmental matters, to verify its compliance with art. 8, i.e. the process that led to this decision, in order to verify that the interests of the individual have been duly taken into account⁵⁰.

In the *Fadeyeva v. Russia* case of 9 June 2005 the ECtHR noted, through the sentence, its auxiliary role in the system

⁴⁹ECtHR, *Hatton and others v. The United Kingdom* of 8 July 2003, par. 97.

⁵⁰ECtHR, *Hatton and others v. The United Kingdom* of 8 July 2003, par. 99.

of the ECHR, clarifying that it must intervene only in case of error thus demonstrating the balance between the interest of the appellant and the public interest. The de minimis rule of the ECtHR was a claim to sustainability according to Art. 8 ECHR given that the environmental risk reaches a minimum level of severity and the assessment of this minimum level was dependent on the circumstances of the case such as a case of physical or mental effects related to the harassment on the health and quality of life of the person⁵¹.

In *Taskin v. Turkey* case of 10 November 2004⁵², the ECtHR has referred to the Aarhus Convention and its pillars to interpret the ECHR. Turkey has not become a party to the treaty and the ECtHR considered that the text has become a “globally accepted practice” (Duvic-Paoli, 2012).

Environmental damages that are created in ways that cause damage to the environment, i.e. through the extraction of a gold mine, found a violation of Art. 8 ECHR for violations of the positive obligations of the article in reference by collecting information for dangerous activities that make

⁵¹ECtHR, *Fadeyeva v. Russia* of 9 June 2005, par. 69.

⁵²ECtHR, *Taşkin and Others v. Turkey* of 10 November 2004.

the information available to the public concerned and thus guaranteeing access to justice in the matter.

According to the ECtHR:

“(...) dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention⁵³ (...) even in the absence of proof of direct damage, the existence of a risk found following an environmental impact assessment is sufficient to constitute a violation of Article 8 (...)” (Seminara, 2016).

⁵³ECtHR, *Taşkın and others v. Turkey* of 10 November 2004, par. 113. *Osman v. United Kingdom* of 28 October 1998: the court does not accept the government’s view concerning the failure to perceive the risk to life in the known circumstances at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or to wilful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention. For the court, and having regard to the nature of the right protected by article 2, a fundamental right in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

In the *Tatar v. Romania* case of 27 January 2009 the ECtHR referred to the right:

“(…) à la jouissance d'un environnement sain et protégé (…)”⁵⁴, which was included in the conventional framework of art. 8 (Cenevska, 2016)⁵⁵.

This case showed the relative abandonment of a procedural approach to environmental issues. The ECtHR found the violation of Art. 8 ECHR under the substantive aspect due to the failure to comply with the precautionary principle by taking preventive measures to counter the relative risk of serious and irreversible damage to the environment where

⁵⁴ECtHR, *Tatar v. Roumanie* of 27 January 2009, par. 107 and 112: “(…) it is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of “victim” on an individual applicant, and only then if he or she produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally. Mere suspicions or conjectures are not enough in that respect (…)”’. See also: *Hardy and Maile v. United Kingdom* of 14 February 2012.

⁵⁵“(…) although the fact that the Romanian Constitution guarantees the right to a healthy environment may have played a role in the Court’s readiness to make a bold statement of this kind, the former nevertheless represents a discernible shift in the language of the Court which opens the way for the concept of a ‘right to a safe and healthy environment’ to influence the ECtHR’s reasoning in future cases (…)”’.

the materialization of such risks is uncertain. The national authorities did not take into consideration the violation of the precautionary principle as well as the national impact assessments and scientific studies which highlighted the serious risks to the environment and human health linked to the carrying out of the mining activity by a mining company. The ECtHR referred to the jurisprudence of the CJEU, the provisions of the treaty of Lisbon and the Communication of the European Commission of 2 February 2000 on the precautionary principle.

In *Di Sarno v. Italy* case of 2012 the environmental value of the right to home and to private and family life was confirmed by the judges of Strasbourg in relation to the waste problem in the Campania area where the ECtHR stated that the states have the obligation to adopt adequate regulation the level of risk of waste management activities, avoiding the exposure of citizens to dangerous situations. Also in this case the margin of appreciation enjoyed by the contracting parties in the choice of the relative concrete measures to fulfill positive obligations according to Art. 8 ECHR (Villiger, 2023)

In *Cordella v. Italy* case relating to air pollution in the ILVA

steel plant in Taranto in southern Italy, the ECtHR exploited a series of ad hoc scientific research to establish the effective danger of ILVA emissions as well as the need for intervention by the Italian authorities. Despite the *actio popularis* which was not accepted, the environmental damages could be translated into violations of the right to privacy of Art. 8 ECHR (Villiger, 2023) when there is an offense to the private or family sphere of a particular person. This condition demonstrated that the related scientific studies relating to pollution put: “(...) all inhabitants “plus vulnérables à diverses maladies” (...) (Keller, Heri, 2022)⁵⁶. States have first of all a positive obligation (Braig, Panov, 2020), particularly in the case of a dangerous activity, to implement legislation adapted to the specificities of this activity, in particular to the level of risk that could arise from it and which the national authorities have failed to take all the necessary measures to ensure the effective protection of the right of the data subjects to respect for their private life. In the previous cases Tatar and Di Sarno did not accept the compensation claims of the appellants, establishing that

⁵⁶ECtHR, Cordella and others v. Italy of 24 January 2019, par. 105.

“les constats de violation de la Convention auxquels elle est parvenue constituent une réparation suffisante pour le dommage moral subi par les requérants” (...)” (Chenevska, 2016)⁵⁷.

Reflecting on the cases just mentioned, we can understand that the protection of a healthy environment in the sphere of protection of the rights recognized by the ECtHR is a way of fulfilling the right to respect private and family life. The legitimate limitations unlike Articles 2 and 3 of the Convention have indicated according to the ECtHR:

“(...) a partial response, in terms of the protection of human rights, to the most recent trends that have emerged in the field of international environmental protection and summarized in the notion of sustainable development, which go precisely in the sense of achieving a balance between the needs of environmental protection and those of economic development (...)” (Villiger, 2023).

⁵⁷“(...) the Court has fully realized that its environmental jurisprudence has consistently accepted to deal with cases marked by the collective/public interest dimension discussed above and that this may well result in a flood of complaints and related compensatory awards against respondent states. Hence, the elimination of the latter remedy may represent a strong disincentive to bring such complaints, which, moreover, should be regarded as unfit for the ECHR architecture (...)”.

The demonstration of the individualistic approach with a direct way of the activity harmful to the environment of the sphere of one's individual rights and more of the private life demonstrates the harm suffered reaching the minimum threshold of severity depending on the circumstances that the ECtHR has evaluated the elements for the intensity and relative lasting time of the pollution, the physical or mental effects on the individual and the environmental contrast that occurs. Art. 8 ECHR was applicable to environmental events that did not include only the pollution caused by the state also because the same was not correctly regulated by the activities of private individuals. The difficulty in assessing environmental issues from the point of view of technical and social aspects puts the states parties in front of the enjoyment of a margin of discretion. A very wide margin which was reduced only in the Cordella case given the auxiliary role of the ECtHR which was limited to verifying that a fair balance had been reached and to the interests of the individual and the community. For the environment, this assessment was one of the various aspects taken into

consideration⁵⁸. As we have understood, the ECtHR found that the national authorities had exceeded their margin of appreciation given that the state legislation on the environment was not respected (Müllerová, 2014)⁵⁹.

In practice, the ECtHR has integrated, alongside Art. 8 ECHR, the principles on environmental protection included in principle 10 of the Declaration of Rio of 1992 on environment and development and the Convention of Aarhus. In the *Tatar v. Romania* case it was highlighted for the first time the precautionary principle as required by international and EU law. It was the only ruling that found a violation of Art. 8 ECHR regarding environmental issues stating that:

“(...) overwhelmingly reactive, focusing on determining responsibility for past violations, leaves the framework ill-suited to mitigation-focused environmental litigation (...)”
(Cima, 2022)⁶⁰

⁵⁸Additional Protocol n. 15 (entered into force: 1st August 2021).

⁵⁹“(...) the cases presented in Europe and the Americas are often centred on issues of the rule of law because they are grounded in the failure of states to enforce their own constitutions, laws and judicial decisions (...)”.

⁶⁰Environmental rights recognition project. The right to a healthy environment: the case for a new Protocol to the European Convention on

due to the absence of the formal consecration of an autonomous subjective right to the environment in the conventional context where the limitations were non-existent (Van De Venis, 2011; Boisson De Chazournes, 2020). Another alternative was the foundation of a high level of protection regarding the existence of a common standard where the European consensus for the relevant national regulations seemed to correspond to such a consensus (Helfer, 1993). The adoption of the new Additional Protocol to the Convention on the Law for a Healthy, Safe and Sustainable Environment was within this context and reiterated by the Parliamentary Assembly of the Council of Europe in September of 2021, where we saw a list of guiding principles of prevention, precaution and non-regression. These principles were the parameters for the mandatory judgment for the ECtHR (Villiger, 2023)⁶¹.

Human Rights, September 2022, p. 18.

⁶¹Parliamentary Assembly of the Council of Europe, Recommendation 2211 (2021). Anchoring the right to a healthy environment: Need for enhanced action by the Council of Europe, 29 September 2021, Appendix, art. 4: <https://pace.coe.int/en/files/29501>

THE “KLIMASENIORINNEN” CASE

An emblematic case for the locus standi of the appellants and for the protection of the environment was the *Klimaseniorinnen v. Switzerland* case of 5 May 2020. The case excluded the possibility of proposing an *actio popularis* by abstractly affecting the provision of the Convention. According to art. 34 with regard to individual appeals, active legitimacy was reserved for natural persons, groups of people and organizations who:

“(...) claim [no] to be the victim of a violation by one of the high contracting parties of the rights recognized in the Convention or in its protocols (...) (Harris, O'Boyle, Warbrick, 2018) and who are able to demonstrate their status as victims (...)” (Villiger, 2023)⁶².

The jurisprudence has admitted in certain circumstances an appellant as a potential victim only⁶³. This is a category of people who risk being directly interested in a national legislation incompatible with the conventional and applicable text. The ECtHR has verified that the violation

⁶²ECtHR, *Káтай v. Hungary* of 18 March 2014, par. 25-26; *Trivkanović v. Croatia* of 6 July 2017, par. 49-51.

⁶³ECtHR, *Practical guide on admissibility criteria*, updated on 31 August 2022, p. 11.

affects only personally. As we have seen in the Cordella case, the judges are based on scientific elements by recognizing the quality of victim to the applicants in the face of the widespread risks to health and the lack of causal links which are ascertained individually.

In the Klimaseniorinnen case:

“(...) the applicants could be recognized as potential victims due to their particular vulnerability (...) to the current (and future) effects of climate change⁶⁴ (...). Implications of such a recognition would obviously be disruptive, but could be managed in an orderly manner by the court recognizing a privileged locus standi to NGOs in the sector (...)”⁶⁵.

The assessments concerned the status of victim were closely connected with an investigation into the merits and require a comparison between the unlawful omissions and

⁶⁴Committee on the elimination of discrimination against women, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, 7 February 2018; United Nations Office of the High Commissioner for Human Rights, Analytical study on the promotion and protection of the rights of older persons in the context of climate change, 2021.

⁶⁵ECtHR, *Meltex Ltd. & Mesrop Movsseyan v. Armenia* of 17 June 2008, par. 66-68.

the positive obligations of the contracting parties according to Articles 2 and 8 ECHR (Moreno-Lax, 2012)⁶⁶. The related prejudices that are connected with climate change prompt the ECtHR to proceed with a systemic interpretation that takes into account:

“(...) the relevant rules of international law, applicable to relations between the parties pursuant to Art. 31.3 lett. c) of the Vienna Convention on the law of treaties (...)”.

To come into relief would thus be, mainly and primarily, the commitments undertaken by the community of states in the Paris Agreement of 2015, as already recognized, on a universal level by the treaty-bodies on human rights of the United Nations⁶⁷ and, at the European regional level, by

⁶⁶ECtHR, *Siliadin v. France* of 26 July 2005, par. 63. *Hirsi Jamaa and Others v. Italy* of 23 February 2012, par. 111; *Regner v. The Czech Republic* of 19 September 2017, par. 98. *Selahattin Demirtaş v. Turkey (n.2)* of 22 December 2020, par. 240.

⁶⁷Committee on the elimination of discrimination against women, committee on economic, social and cultural rights, committee on the protection of the rights of all migrant workers and members of their families, committee on the rights of the child, committee on the rights with disabilities, Joint Statement on Human Rights and Climate Change, 16 September 2019 which is affirmed that: “(...) climate change poses significant risks to the enjoyment of the human rights protected by the

various national courts (Minnerop, 2022)⁶⁸. The interconnection between climate change and human rights is also expressly recognized in the preamble of this Agreement:

“(...) acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity (...)” (Savaresi, 2016; Rajamani, 2018; Boyle, 2018; Akande,

International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities (...)”.

⁶⁸Constitutional Court of German: Order of the First Senate, 24 March 2021, - 1 BvR 2656/18, par. 99 “(...) the protection of life and physical integrity under Art. 2(2) first sentence GG [Basic Law] extends to protection against impairments caused by environmental pollution [and] includes protection against risks to human life and health caused by climate change (...)”.

Kuosmanen, Mcdermott, Roster, 2020; Knox, 2020; Wegener, 2020)⁶⁹.

The Paris Agreement was made to guarantee:

“(...) the maintenance of the average increase in global temperature below two degrees Celsius compared to pre-industrial levels; in the short term, limiting the increase to 1.5 degrees Celsius (...)”⁷⁰.

⁶⁹United Nations Framework Convention on Climate Change (UNFCCC), Paris, 12 December 2015, preamble, recital 11. According to Rajamani: “(...) the language in the Paris Agreement will be taken as signaling increased openness within the climate regime to concerns and arguments based on human rights (...)”. According to Knox: “(...) States had generally accepted the idea that human rights are relevant to climate change even before Paris, and the language in the Paris Agreement will be taken as signaling increased openness within the climate regime to concerns and arguments based on human rights (...) in an important sense, the Paris Agreement signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations. This is a real achievement and, in this respect as in many others, the Paris Agreement is worth celebrating. In another sense, however, Paris is only the beginning. Now comes the difficult work of implementing and strengthening the commitments made there. In that effort, human rights norms will continue to be of fundamental importance (...)”.

⁷⁰Art. 2(1)(a) of Paris Agreement.

The related efforts that have been made achieve a twofold goal. As we have noted in the treaty there is no information, precise indications on the level of reduction of global emissions necessary for this objective nor the specific contribution required of each state party. The mitigation of a state as a specific objective is a benchmark in the relevant national regulations that are in existence. The Strasbourg judges used the national mitigation plans that each state is required to prepare, communicate and maintain according to Art. 4, par. 2 of the Paris Agreement (Mayer, 2018; Du Pont, Meinshausen, 2018; Mayer, 2023)⁷¹. Contributions are outlined by states based on the possible ambition principle of the standard of the due diligence. Therefore, the ECtHR relied on the track of national mitigation contributions undoubtedly if all was compliant with the subsidiary role of the ECHR. Already in this way through the Cordella case it was stated that:

“(...) while it is not for it to determine precisely what measures should have been taken in the present case in

⁷¹According to Mayer: “(...) international courts and tribunals have consistently recognized that are themselves capable of creating legal obligations (...)”.

order to reduce the level of pollution more effectively, it is undoubtedly for it to determine whether the national authorities approached the question with due diligence (...)” (Pedersen, 2021)⁷².

Climate change is now a global phenomenon that calls for the impossibility of attributing responsibility to individual countries. This statement is accompanied by the negligible effect of reducing greenhouse gas emissions by a single state. Within this context we recall from the Supreme Court of the Netherlands the Urgenda case:

“(...) acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share (...)”.

This defence is ruled out. Each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution the greatest. The UNFCCC is based on the premise that all member countries must take measures to prevent climate

⁷²ECtHR, *Cordella and others v. Italy*, op. cit., par. 161. “(...) the obligations emerging from the Echr in the context of environmental risks provide no substantive targets, objectives, or emission-type standards, as is commonly the case in environmental and climate change law. Expecting the court to move into this territory would require a significant expansion of its doctrine (...)”.

change, in accordance with their specific responsibilities and options. Each country is thus responsible for its own share. This means that a country cannot escape its own share of responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The state is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the state to do “its part” is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur and will endanger the lives and welfare of many people in the Netherlands. The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible (Tabau, Cournil, 2015; Roy, Woerdman,

2016; Stoyanova, 2018; Minnerop, 2019; Verschuuren, 2019; Kaminski, 2019; Schwartz, 2019; Burgers, Staal, 2019; Nollkaemper, Burgers, 2020; Leijten, 2020; Erinosh, 2020; Backes, Van Der Veen, 2020; Antonopoulos, 2020; Wewerinke-Singh, McCoach, 2021; Spijkers, 2022)⁷³. For protection against climate change, the contribution of each individual state is essential but that does not also mean equivalent (Spier, 2019)⁷⁴.

Since the period of the Paris Agreements, the sharing of mitigation efforts has been recognized and based on the principles of equity and common responsibility but has been differentiated by the respective capacities (Rajamani, 2000; Rajamani, 2016; Voigt, Ferreira, 2016; Meljean-Dubois, 2016; Rajamani, 2019)⁷⁵. States that are responsible for

⁷³Supreme Court of the Netherlands, Urgenda Foundation v. The State of the Netherlands of 20 December 2019, par. 5.7.7. See also from the Federal Court of Canada the case: La Rose and others v. Her Majesty the Queen and others (Federal Court, Case No. T-1750-19, 27 October 2020 [2020 F.C. 1008]).

⁷⁴See Accord of Paris codified in art. 2.1 which is affirmed: “(...) not only all countries together, but also each single country should take adequate measures to achieve that imperative (...)”.

⁷⁵UNFCCC, art. 2.2 and art. 3.1.

global warming have been assigned the related task of: “(...) taking the lead in the fight against climate change and its negative effects (...)” (Rajamani, 2019).

The absence of unanimous consensus on how to apply these types of principles according to the objectives of fair share determination regarding the content of a state's mitigation obligation as a benchmark proposed by national climate litigation and with regard to the measures taken by those countries that are not in a first-class, but comparable economic situation, is evident (Stein, Castermans, 2017; Stamhuis, 2017; Kelleher, 2020; Alston, Adelmant, Blainey, 2020; Rodriguez Garavito, 2022)⁷⁶. Can we tell to these

⁷⁶VZW Klimaatzaak v. Kingdom of Belgium and others of 27 April 2015: https://affaire-climat.be/documents/affaire_climat_Citation_fr.pdf. Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy, Case No. CO/16/2018, [2018] EWHC 1892 (20 July 2018, UK). Friends of the Irish Environment CLG v. The Government of Ireland & Ors, Case 2017 No. 793 JR, [2019] IEHC 747 (19 September 2019, H. Ct), par. 159 affirms that: “(...) this is an area where the executive has a wide discretion to assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion. The Secretary of State has decided, having had regard to the advice of the Committee, that now is not the time to revise the 2050 carbon target. That decision is not arguably unlawful, and

people that their human rights have not been violated because it is difficult to apportion responsibility? Perhaps we must, but that is surely because the law is wrong, rather than because our instincts of fairness, equity, and justice are wrong. A human rights perspective helps shift the focus

accordingly the human rights challenge is not sustainable (...) similar proceedings had been brought by persons who undoubtedly had standing, then it would have been necessary for this court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity (...)” (§ 8.14). According to the judge Clarke: “(...) there is a danger that the use of the term “unenumerated” conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution’ (§ 8.5) (...) in the expression (...) there must be some root of title in the text or structure of the Constitution from which the right in question can be derived’ (§ 8.6) (...) may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the state whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure (...). It cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution’ (§ 8.6) (...). It can and must act to vindicate such rights and uphold the Constitution (...). If an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which

of climate change more directly onto individuals and the effects of climate change on their lives. This is one of the key failings of climate change diplomacy over the past two decades is that the phenomenon has been viewed as a scientific projection, “a kind of line graph stretching into

can also involve policy’ (§ 8.16) (...)”. See also the case: Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC), Bundesverwaltungsgericht [BVGE] (Federal Administrative Tribunal), (Ruling on Real Acts Relating to Climate Protection, sentence A-2992/2017, 27 November 2018). EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others, Case No. 65662/16, [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP), 6 March 2017. ENvironnement JEUnesse v. Procureur General du Canada, Cour Supérieure, Province de Québec, District de Montréal, Case No. 500-06-000955-183, 11 July 2019 (Can.), which is affirmed that: “(...) the task of providing legal protection from government authorities, such as the state, pre-eminently belong to the domain of a judge (...) the claim does not fall outside the scope of the court’s domain. The claim essentially concerns legal protection and therefore requires a “judicial review” (...). This does not mean that allowing one or more components of the claim can [not] also have political consequences and in that respect can affect political decision-making (...). This is inherent in the role of the court with respect to government authorities in a state under the rule of law (...). Jeunesse's claims regarding Canada's choices and decisions appear, at this stage, to be directed to the

the future with abstract measurements based on parts per million, degrees centigrade or centimetres. International community has largely failed to translate the important and hard-won scientific consensus into an equally compelling vision of how the consequences of global warming are being felt by people and communities around the world. The world has failed to humanise climate change. Humanizing climate change creates an ethical imperative to act that can with time translate into legal obligations (Limon, 2009).

Finally, according to Affolder:

“(...) environmental law is on the move. This reality is not lost on scholars who, using diverse discourses of transplantation, spread, transmission, diffusion, cross-

exercise of executive power, whereas the order sought to stop any violation of fundamental rights, according to the respondent, appears to be related to the legislative process (...). Courts do not interfere in the exercise of executive power. But in the case of an alleged violation of the rights guaranteed by the Canadian Charter, a court should not decline jurisdiction on the basis of the doctrine of justiciability (...). The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under Art. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts (...)”.

fertilisation, dissemination, and even impregnation, document multiple manifestations of a similar environmental law ideas (...) the language of “contagious environmental lawmaking” might effectively define a space for discussing the ways in which legal ideas spread, and are being spread, across diverse jurisdictions and sites of lawmaking (...)” (Affolder, 2019).

CONCLUDING REMARKS

Regardless of the relative recognition of an autonomous right for environmental health, especially in the field of conventional climate change, the ECtHR has established various tools that were necessary to play a subsidiary role in the climate field in compliance with national prerogatives. The jurisprudential cases relating to the environmental sector and within the margin of appreciation of the states appear inevitably limited and in consideration of the legislation, more I would say of the European jurisprudence based on the roof of the binding rules and coming from the climate regulation of international law (Alston, 2017; Savaresi, Auz, 2019;

Neuman, 2020; Eicke, 2022)⁷⁷.

From the above cases relating to the protection of human rights (Heinämäki, 2022) and from climate litigation we have understood a certain need to demonstrate the existence of a causal link between the greenhouse gas emissions that are produced by a state and the failure by it to adopt the mandatory adaptation measures, necessary from the consequent negative impacts deriving from climate change that affect the enjoyment of human rights. The question of the responsiveness of international and

⁷⁷According to Eicke: “(...) unlike the ECtHR, from the perspective of international law, national courts—just like the national parliament and the national government—are organs of the state and are thus involved in (and co-responsible for) the implementation of binding obligations under international law, including the obligations under the Paris Agreement. Such direct responsibility and involvement does not exist for the ECtHR; quite the contrary. As already mentioned, Article 19 ECHR limits the task of the ECtHR to ensuring ‘the observance of the engagements’ that states have assumed in the Convention in a manner binding under international law. This difference in roles between national and international courts also goes some way to explaining the fundamental principle of subsidiarity developed by the Court and, since the entry into force of Additional Protocol No. 15 on 1 August 2021, explicitly referred to in the preamble of the Convention (...)”.

national human rights law poses a problematic situation to claim the individual as a protagonist and responsible for the violation of human rights within the scope of future and eventual damage linked to a specific impact of climate change which has not materialized yet.

The relative difficulty of extraterritorial application of national and international human rights norms which demand the responsibility of governments and multinationals for the various types of harmful conduct towards the individual lies outside the territory of the involved state. In these cases the discourse is not only of extraterritoriality but also of state responsibility. The continuous human rights crises that many European countries go through as political movements imply an absolute parity in the distribution of resources with an intergenerational equality that imposes a balance of current needs with future ones, ensuring a form of flexibility for the future generations and to those that concern the pursuit of one's goals with an essential way⁷⁸.

⁷⁸José D. Rodríguez Peña et al. v. Presidencia de la República de Colombia et al., Acción de Tutela, p. 4, § 2 (Síntesis de la Acción de Tutela) (Tribunal Superior del Distrito Judicial de Bogotá-Sala Civil) (Colom.), 29 January

By discussing on choices and safeguarding the variety and diversity of natural resources, we allow future generations the possibility to meet their needs. We are talking about a quality of ecosystem that is comparable to that enjoyed by previous generations thus avoiding excessive degradation of the same. Discussion and conservation means access to the planet's resources in such a way that present and future generations will have the opportunity to use natural resources for this type of benefit.

In some other cases we have understood that the mere exercise of political discretion as well as the adoption of any regulatory form that contrasts with climate change by building a sufficient element in relation to government activity and regardless of the fact that the enjoyment of the fundamental rights of the citizens of the state, is a topic that concerns the next generations and the future of our children! Concluding with the words of Knox:

“(...) many people that will be living in 2100 are not yet

2018: “(...) porque la equidad intergeneracional no se da únicamente entre la generación presente y una generación futura de personas que aún no existen sino que también ocurre entre quienes hoy toman decisiones y la generación de personas más jóvenes que enfrentaremos los efectos de las decisiones que se toman en el presente (...)”.

born, and in that sense truly belong to future generations. But many people who will be living then are already alive today. [...] [T]he line between future generations and today's children shifts every time another baby arrives and inherits their full entitlement of human rights. It is critical, therefore, that discussions of future generations take into account the rights of the children who are constantly arriving, or have already arrived, on this planet. We do not need to look far to see the people whose future lives will be affected by our actions today. They are already here! (...)” (Knox, 2019).

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